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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1945

No. 771

STANLEY G. KLUMB,

Petitioner,

vs.

JOHN ROACH AND EDWIN B. H. TOWER, JR.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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HAMMERSMITH-KORTMEYER CO. MILWAUKEE

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Stanley G. Klumb, respectfully prays for a Writ of Certiorari to the Circuit Court of Appeals for the Seventh Circuit, to review an opinion of that court filed on October 26, 1945.

I. SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

This suit was brought by the plaintiff Klumb under R.S. Sec. 4915 (Title 35 U.S.C.A. Sec. 63) to obtain a patent over the decision of the patent office in an interference proceeding, *Roach v. Klumb,* No. 75,368.

In the Patent Office both the Examiner of Interferences and the Board of Appeals[1] awarded priority of invention to the defendant Roach. The complaint in this suit was thereupon filed in the District Court of the Eastern District of Wisconsin on April 4, 1941, within six (6) months of the decision of the Board of Appeals (R. p. 2).

There was a recorded assignment of a one half (½) interest to the defendant Tower in and to the patent rights claimed by the defendant Roach.

But because Tower had been the attorney for Roach during the proceedings in the case, both in the Patent Office and subsequently, he was inadvertently not made a party defendant to the action, Roach being the only defendant named in the complaint as originally filed.

On April 10, 1943, after a trial on the merits of the case, the District Court rendered an opinion in favor of the plaintiff Klumb adjudicating him the first inventor of the subject matter in issue (R. p. 451). Four days after the court had rendered this opinion, and before judgment was entered, respondent Tower sent a letter to the Commissioner of Patents requesting that the Commissioner disregard Tower's previous request for three months' deferment in the issuance of Letters Patent to Roach and that such Letters Patent be issued forthwith (R. p. 166, 478). The patent, No. 2,318,832, was issued May 11, 1943 (R. p. 168, 479).

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[1]The interference proceeding was brought under R.S. Sec. 4915, prior to the amendment of Aug. 5, 1939. Sec. 5 of that Act, 53 Stat. 1212 says: "This Act shall take effect two months after its approval; but it shall not affect interferences then pending, which may be heard and decided and appeals and other proceedings taken under the statutes in force at the time of approval of this Act as if such statutes had not been amended."

Because of the issuance of the patent, No. 2,318,832, plaintiff, on June 5, 1943, before the rendering of final judgment, filed a motion to reopen the case for the purposes of: (1) making Tower a party defendant thereto by amending the complaint, (2) introducing in evidence the letter from Tower to the Commission of Patents, and (3) introducing in evidence a copy of Letters Patent No. 2,318,832 (R. p. 455).

Plaintiff's motion was granted, and Tower was accordingly made a defendant in the action. (R. p. 457).

Tower did not raise the defense of want of jurisdiction as to his person either at this time or subsequently. During the hearing on the amendment to the complaint Tower pointed out to the Court that his interest in the invention was disclosed by the file wrapper introduced in the trial against Roach. The following colloquy then took place (R. p. 169):

> "The Court: Did you call it to the court's attention?
>
> "Mr. Tower: I didn't have the time. That wasn't the point of this case. I wasn't bringing the suit. The other side was bringing the suit and it was up to them to plead the parties they want to make to the suit. You had jurisdiction of one party. You didn't have to have me here to determine the issue involved on the 4915. The fact is: I didn't have to appear at all."

Defendant Tower then moved for leave to file an answer to the original complaint and to introduce evidence upon the defenses pleaded in said answer (R. p. 463). The court in denying this motion found that "an examination of said proposed answer demonstrates that said defendant Tower desires to have a trial not only upon

the issues heretofore passed on by the court, but also various other issues which the said Tower could have raised at the trial in behalf of his client, Roach, but which he failed to do." (R. p. 467).

Subsequently, the Court awarded final judgment to the plaintiff Klumb against defendants Roach and Tower. (R. p. 480).

Upon appeal, the defendants moved that the judgment awarded by the District Court be reversed and the suit dismissed (R. p. 515) for want of jurisdiction. As a basis for such motion they argued, for the first time, that the plaintiff had failed to file a complaint and prosecute the suit against all the adverse and indispensable parties within the period prescribed by the section upon which the action was predicated.

So far as it is pertinent, Sec. 4915 R.S. reads as follows:

> "Whenever a patent on application is refused by the Board of Appeals, or whenever any applicant is dissatisfied with the decision of the board of interference examiners, the applicant, unless appeal has been taken to the United States Court of Customs and Patent Appeals, and such appeal is pending or has been decided, in which case no action may be brought under this section, may have remedy by bill in equity, if filed within six (6) months after such refusal or decision; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim or for any part thereof, as the facts in the case may appear."

In its opinion[1] the Circuit Court of Appeals for the Seventh Circuit sustained the position of the defendant

[1] The opinion of the Circuit Court of Appeals in nowise controverted the District Court's finding that Klumb was the first inventor.

Tower as to the issue of jurisdiction on the theory that Sec. 4915 requires that all adverse parties be made defendants to an action under that section within six (6) months after the refusal or decision of the Board of Appeals.

Petitioner contends that the phrase "may have remedy by bill in equity if filed within six (6) months after such refusal or decision" in Sec. 4915 means that the bill, that is to say the complaint, must be filed within that time and that it is not necessary that the Court have jurisdiction over all of the parties within the six (6) months period.

QUESTION PRESENTED

The sole question presented for the consideration of this Court, therefore, is whether, under the facts in this case, the District Court had jurisdiction to issue a judgment binding on both defendants under Sec. 4915 R.S.

REASONS FOR GRANTING THE WRIT

Your petitioner respectfully prays that the Writ be allowed for the following reasons:

1. The decision of the Court of Appeals is in conflict with the express provisions of U.S. Code Title 35 Sec. 63 (Sec. 4915 R.S.).

2. The decision of the Court of Appeals for the Seventh Circuit is in conflict with decisions of the Circuit Courts of Appeals for other Circuits and with decisions of this Court.

It has repeatedly been held that an action under a statute of limitations need only be *commenced* within the statutory period and that it is not necessary for the Court to

have *acquired jurisdiction* over the parties to such actions within the period of statutory limitation. Further, it has been held by this Court that the complaint may be amended after the statutory period has run without imperilling the plaintiff's action so long as the complaint itself is timely filed, and even, in the case of *Missouri, Kansas and Texas Railroad Company v. Wulf,* 226 U.S. 570, 33 S.Ct. 135, 57 L.Ed. 355, that the plaintiff may sue in a new capacity and under a new statute after the statutory period has expired, as long as the original complaint has been filed within the time allowed.

3. The Circuit Court of Appeals for the Seventh Circuit has decided an important question of Federal Law which has not been, but should be, decided by this Court. By its opinion, the Circuit Court has held in effect that an attorney who litigates a case from its commencement until judgment is awarded does not stand in such a relation of privity to his client that the defenses which he has pleaded and the evidence which he has introduced therein are binding upon him in the judgment in the action.

The question for decision of this Court, therefore, is whether due process of law has been had against an attorney in such a case.

4. The importance of this case to large numbers of farmers as well as to the entire electric fence industry affords reason for the exercise of this Court's discretion to grant the writ.

In its decision upon the merits of the case the District Court held that the plaintiff Klumb is entitled to a patent on the subject matter in issue, hence, the Roach patent, issued after the District Court announced its decision, is invalid. It can therefore, afford no protection to those whose rights are founded upon it; and while Klumb has

been adjudged the prior inventor by the judgment entered upon a trial on the merits by the District Court, Klumb, nevertheless, is unable to assert his rights to the invention, or to protect those who have taken under his claims, because of the decision of the Circuit Court of Appeals.

This presents a situation in which a large element of the American public has an immediate interest in affording to the Petitioner the protection of his rights which has been denied by the decision of the Circuit Court. It is, therefore, such a case as comes within the discretionary powers of this Court as established by *De Forest Radio Co. v. General Electric Co.*, 283 U.S. 664, 51 S.Ct. 563, 75 L.Ed. 1339; *American Fruit Growers, Inc. v. Brogdex Co.*, 283 U.S. 1, 51 S.Ct. 328, 75 L.Ed. 801; and *Altoona Publix Theaters, Inc. v. American Tri-Ergon Corp. et al.*, 294 U.S. 477, 55 S.Ct. 455, 79 L.Ed. 1005.

Wherefore your petitioner respectfully prays that a Writ of Certiorari be issued under the seal of this Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding the said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings of the Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court, that the judgment of the Circuit Court of Appeals be reversed, and that petitioner be granted such other and further relief as may seem proper.

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STANLEY G. KLUMB

Milwaukee, Wisconsin
January 21, 1946